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# Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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## Appendix A

STATE OF VERMONT

SUPREME COURT

Montpelier, Vermont
Nov. 21, 1961

To:

Clerk, Public Service Commission,
Montpelier, Vt.

Reporter of Decisions, F. A. Bosworth, Esq.,
Middlebury, Vt.

And to Counsel as follows:

C. G. Parker, Esq., Morrisville, Vermont
Arthur Graves, Esq., St. Johnsbury, Vermont
Edwin W. Lawrence, Esq., Rutland, Vermont.

Re: 1910, Citizens Utilities Co. *v.* Prouty et als (Wash.)

Gentlemen:

Please be advised that the Supreme Court has this day made the following entry in the above-entitled case. A copy of the opinion is this day being forwarded to the Reporter of Decisions and to State Library, Montpelier, Vermont:

> Judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Co. to condemn and to acquire the petitionee's property is reversed for want of jurisdiction. Let the result be certified to the Public Service Commission. November 21, 1961.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court at Montpelier, in the County of Washington, this 21st day of November A. D. 1961.

NORMAN E. PORUZZI
Clerk.

(SEAL)

## Appendix B

SUPREME COURT

WASHINGTON COUNTY

September Term, 1961 — No. 1910

CITIZENS UTILITIES CO.
(Newport Electric Div.)

*v.*

CHARLES T. PROUTY ET ALS.

Present: HULBURD, C. J., HOLDEN, SHANGRAW, BARNEY and SMITH, JJ.

SMITH, J. This is a joint appeal by petitioners and petitionees from an order of the Public Service Commission granting to the petitioner, in accordance with its petition for eminent domain, title to certain real estate, owned by the petitionees, located on both sides of the Clyde River, in the City of Newport, Vt., and awarding compensation to the petitionees for such taking.

The petitioner is a Delaware corporation, licensed to do business in the State of Vermont, and is a public service company operating and carrying on the business of supplying electric power and energy to consumers of various kinds in Essex, Orleans, Franklin and Grand Isle counties in the State of Vermont.

The petitionees are the owners of lands situated on the banks of the Clyde river and are the successors in title to Abbie D. Prouty, now deceased.

The petitionees in their appeal to this Court have denied jurisdiction of the Vermont Public Service Commission to

condemn lands owned by them under the eminent domain proceedings brought by the petitioner before the Commission. The petitioner, on its part, brings its appeal here because of claimed error on the part of the Vermont Public Service Commission in its determination of the fair market price of the land which the petitioner has been ordered to pay to the petitioners under the order of the Commission.

The jurisdictional question presented by the petitioners is the paramount one for our consideration, for if jurisdiction is lacking in the Public Service Commission then the entire order is of no force and effect.

The Clyde river rises in the northeastern part of Vermont and empties into Lake Memphremagog at Newport. Upon this river the petitioner has built hydroelectric dams at several places including the outlet of Seymour Lake and Echo Pond, and also across the river at West Charleston and at Clyde Pond. The water from the Clyde Pond storage reservoir is conveyed by steel penstocks to the powerhouse of the petitioner at Newport. These penstocks are located upon the land of the petitioners, and it is this land that the petitioner seeks to acquire by the proceedings in eminent domain before the Public Service Commission. The total area of the land is about 5.4 acres, and it lies for about 700 ft. on both sides of the Clyde river between the Clyde Pond dam and the Newport powerhouse.

The owner of these lands in 1930 was one Abbie D. Prouty. A lease was entered into in that year between Abbie D. Prouty and the Newport Electric Company, the petitioner's predecessor, for a twenty-five year period, at a yearly rental of $7,500, plus taxes. An option to pur-

chase the land for $150,000, expiring Oct. 1, 1935, and contained in the lease, was not exercised by the petitioner.

Under the terms of the lease, the option not having been exercised, there was an agreement that at the expiration of the lease the lessor would sell, and the lessee would buy the land at a mutually agreeable price. In the event they could not agree upon a price, then the lessee was to bring condemnation proceedings "before the tribunal then having jurisdiction", within six months from the expiration date. If the lessee failed to bring such proceedings then it was to pay to the lessor $300,000 for the land described in the lease.

The parties did not agree upon a price for the land and the lessee brought this condemnation proceeding before the Public Service Commission within the six months' period, on March 21, 1956.

The contention of the petitionees, before the Public Service Commission, and now here, is that the Public Service Commission has no jurisdiction because of the fact that the Clyde river is navigable and is subject to the jurisdiction of the Federal Power Commission.

The petitionees on May 11, 1956, sought an injunction to prohibit further proceedings before the Public Service Commission, in the United States District Court in Vermont. The United States District Court refused the injunction, but found the Clyde River to be a navigable stream and granted judgment for $300,000 to the petitionees here. Upon appeal from the District Court, the United States Court of Appeals for the Second Circuit reversed the District Court and indicated that the question of jurisdiction was properly an issue for the Public Service Commission, itself, to determine. Prouty et al v. Citizens Utilities Company, 257 F. 2d 692.

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The Federal Power Commission started an investigation into the matter of the navigability of the Clyde river on June 24, 1957. An order was issued from the Federal Power Commission on Feb. 16, 1959 directing the petitioner to apply for a license under the Federal Power Act for the continued operation and maintenance of its projects consisting of a Unit No. 11, Newport and Charleston hydro-electric developments and the Seymour Lake and Echo Pond dams. In the opinion upon which its order was based the Federal Power Commission found the Clyde river to be navigable from its sources to Lake Memphremagog.

An appeal from the opinion and order was taken by the petitioner to the United States Court of Appeals, 2d District. On May 24, 1960, in an opinion written by Judge Learned Hand, the United States Court of Appeals for the Second Circuit, affirmed the order of the Commission. The opinion stated that the last mile of the Clyde river was navigable, left the question of how much of the Clyde river above the one mile was navigable "open", but did find that all of the petitioner's dams on the Clyde river "affected" the navigability of the last mile. Citizens Utilities *v.* F.P.C. 279 F. 2d 1.

The order of the Public Service Commission was filed on Nov. 10, 1960. The report of the Commission indicates its knowledge of the order of the Federal Power Commission and of the decision of the United States Court of Appeals, 2nd District, affirming that order. The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain by the Federal authorities.

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The Public Service Commission decided that the petition before it, which asks for the condemnation of land between a power plant and a dam, and over which land penstocks carry water from dam to powerhouse, was governed by the revisions of 30 V.S.A. §111 (1). This section provides:

> "When the Commission finds, in the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission has been granted:"

that the Commission then has authority to proceed with the petition for condemnation of land by eminent domain.

The jurisdiction of the Public Service Commission is limited to "dams and projects that relate to or are incident to the generation of electric energy for public use." 10 V.S.A. §701 (a).

Referring again to 30 V.S.A. §111 (1), in Sec. 115 of 30 V.S.A., it is provided "without limiting or enlarging the scope of Sections 109-114 of this title, it is hereby specifically provided that they shall apply to the condemnation of rights to construct and maintain pipe lines, conduits, lines of poles, towers or wires, and to rights to appropriate, divert and flow back water." We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated must be authorized under Section 111 (1) of 30 V.S.A.

The certificate of public good mentioned in 30 V.S.A. §111 (1) is issued by the Public Service Commission after a hearing on a proposed project and a determination by the Commission that the proposed project is for the benefit of the people of the State of Vermont. 10 V.S.A.

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§706. The petitioner has no certificate of public good in the instant case, but it is the position of the Commission that it may dispense with this requirement because most of the original project here involved was constructed before such a certificate was made a necessity for proceedings in eminent condemnation in the case of dams (1945).

The petitioners have briefed their exceptions to this waiver on the part of the Commission of the possession of a certificate of public good, but it is the lack of a license from the Federal Power Commission on which their principal objection to jurisdiction is made, and to this we turn our immediate attention.

The Public Service Commission has stated in its report that the portion of the Clyde river herein involved has not been declared to be navigable, but that if the river was navigable, and a license required of the petitioner, it would still have jurisdiction of the matter.

The United States Court of Appeals for the Second Circuit stated:

> "Since there can be no doubt that the last mile of the river is 'navigable' without change the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the (Federal Power) Commission jurisdiction over the granting of a license."

In affirming the order of the Federal Power Commission requiring an application for a license on the part of the petitioner, Judge Hand declared:

> "Concluding as we do that all the petitioner's dams on the Clyde river do 'affect the navigability' of the last mile of that river it becomes unnecessary for us to decide how much, if any, of the river above Unit No. 11 is 'navigable'."

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What the Federal Court has said here is that it is unnecessary to determine whether the Clyde river, above the last mile, is navigable, because the flow of such upper part of the river has a direct effect upon that part declared to be navigable, and thus any projects upon this upper part of the river were under the jurisdiction of the Federal Power Commission. This is borne out completely by the fact that the order requiring the petitioner to obtain a license (which was affirmed) included the Clyde river dam, with which we are concerned, as well as two others even more distant up the stream.

The licensing power of the Federal Power Commission is set forth in the first sentence of Section 23, 16 U. S. C. 817:

> "It shall be unlawful for any person, state or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories) or utilize the surplus water or water power from any government dam, except under and in accordance with the terms of a permit or valid existing right of way granted prior to June 10, 1920, or a license granted pursuant to this chapter."

The next sentence of Section 23, U. S. C. 817 applies to waters other than navigable waters over which the Congress has jurisdiction and makes the same licensing requirement. The case of Georgia Power Company v. Federal Power Commission, 152 F.2d 908, cited by Judge Hand with approval in the Citizens Utilities Company v. Federal Power Commission case (supra), states:

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> "We fully agree with the Fourth Circuit that one of the purposes of the Water Power Act was to authorize the Commission to license dams in navigable water of the United States in lieu of an Act of Congress, and in our opinion one of the purposes of Section 23 was to likewise take care of the case of a proposed structure in a non navigable tributary of an interstate navigable stream."

See also the recent case of U. S. v. Grand River Dam Authority, 363 U. S. 229, in which the power of flood control of the United States was held to extend to the tributaries of a navigable stream.

The Vermont Public Service Commission, before its decision, thus was faced with a petitioner asking it to condemn land in connection with a project under the jurisdiction of the Federal Power Commission but without the petitioner having the license required under the Federal Power Act to operate and maintain the project in furtherance of which the petitioner sought to acquire the land.

Troublesome, in this connection, was the fact that the petition for condemnation had been entered before the Public Service Commission at a time prior to the assumption of jurisdiction over the project by the Federal Power Commission, and its order that a license be obtained. Because, while the Public Service Commission still had the matter under consideration, it was presented with the fact of jurisdiction of the Federal Power Commission over the project, and of the failure of the petitioner to obtain the required license. These facts were noted in its report and order.

The Public Service Commission met the problem head-on by declaring that it retained jurisdiction over the con-

demnation proceedings even if the Clyde river was navigable, and despite the fact that the petitioner was without the license made mandatory by the order of the Federal Power Commission.

The Public Service Commission cites in support of its position that 16 U.S.C. 814 allows a licensee of the Federal Power Commission to seek condemnation in a state court. It also cites the case of **Oakland Club v. South Carolina Public Service Commission**, 110 F.2d 84 as further support for authority that a licensee, at its option, may proceed in a state court for condemnation proceedings.

The petitioner, in its brief supporting this ruling of the Public Service Commission, cites to us the cases of **Harris v. Central Nebraska Public Service Power and Irr. District**, 29 Fed. Supp. 425 and **Burnett v. Central Nebraska Public Power Irr. District**, 23 N.W.2d 661 as authority that a licensee may use a state court in eminent domain procedure for the condemnation of land. The case of Superintendent of Public Works v. Paonesso, 14 Misc. (N.Y.) 2nd 787, a decision of an inferior court of the State of New York, is one upon which the petitioner places considerable reliance. But this case also has to do with a holder of a federal license and its holding is that an agency of the state which accepts a federal license may proceed either under the state's own power of eminent domain, or under the federal license. But the petitioner here is neither an agency of the State, nor is it a federal license holder, although under order to obtain such a license.

A private corporation has no right to eminent domain in the absence of a delegation of such power to it from

the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain p. 12. See George v. Consolidated Lighting Co., 87 Vt. 111. The statutory provision of 30 V.S.A. 111 (1) grants the right of eminent domain to a private corporation before the Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission. The certificate of public good is the vehicle by which the State of Vermont delegates the right of eminent domain to a private corporation, just as the license from the Federal Power Commission serves as the delegation of such power on the part of the United States.

The issuance of a certificate of public good by the Public Service Commission is a determination that the project for which the certificate is granted is in the public interest of the State of Vermont. George v. Consolidated Lighting Co., 87 Vt. 411. The granting of a license for a project by the Federal Power Commission is an affirmative determination by that body that the project so licensed is in the interest of the United States.

In the instant case the facility of the private corporation for which land is sought to be obtained by eminent domain is upon a navigable stream. The Vermont Public Service Commission has no authority to authorize a project or facility upon a navigable stream over which the Federal Power Commission has assumed jurisdiction, and therefore has no jurisdiction to issue a certificate of public good which is the grant of such authority. Bellows Falls Hydro Electric Corp., 114 Vt. 443.

It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a

certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemned.

The license to maintain a facility upon a navigable stream must come from the Federal Power Commission. Bellows Falls Hydro Electric Corp., 114 Vt. 443, 448.

At the time the petitioner filed its petition for condemnation it was under no order to obtain a license to maintain the project for which it sought the land. It would even appear from the record before us that the project for which the land was sought had been completed and in operation before the petitioner became subject to the Federal licensing requirement. But during the pendency of the petition before the Public Service Commission, and prior to its determination of the questions presented to it there came about a change in both the factual and legal situation presented for its consideration.

The Commission was confronted with the fact that the Clyde river, at the point where the project was situated, had been determined to have an effect on a navigable stream, and was under the jurisdiction of Congress. It was also confronted with the situation that a license must be obtained by its petitioner from the Federal Power Commission to legally maintain its project for which it sought to condemn land, and to confer upon it the right of eminent domain.

Despite the fact that its project might have been previously built, under State authority, the order from the Federal Power Commission to obtain a license was required to be obeyed by the petitioner. The Seneca Indian

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**Nation v. Power Authority of N. Y., 257 F. 2d 883. Penn. Water and Power Co. v. F. P. C., 123 F. 2d 155.**

Where a federal agency of administrative body acts in a field permitted by a valid federal statute, its authority is paramount to that of any state board or agency, and where a federal board assumes jurisdiction of a particular case after a state board has taken jurisdiction thereof, the state board's jurisdiction is ousted. National Labor Relations Board v. Eclipse Moulded Products Co., 126 F. 2d 576; 73 C.J.S. Public Administrative Bodies and Procedure, p. 378.

No question would be presented here if the petitioner had seen fit to secure the license it is under order to obtain by the Federal Power Commission. Jurisdiction to condemn the land sought would be vested in the Public Service Commission by 30 V.S.A. §111 (1) as well as by 16 U.S.C. §817.

Without the license the Public Service Commission lacks the proof of authorization of the project required by 30 V.S.A. §111 (1) which is necessary for jurisdiction of the eminent domain proceedings brought by the petitioner.

The judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Company, to condemn and to acquire the petitioners' property upon the payment of $93,000.00 is reversed for want of jurisdiction. *Let the result be certified to the Public Service Commission.*

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**SUPREME COURT**

WASHINGTON COUNTY

September Term, 1961

No. 1910

CITIZENS UTILITIES CO.
(Newport Electric Div.)

*v.*

CHARLES T. PROUTY ET ALS.

BARNEY, J. (Concurring) Valid exercise of the power of eminent domain by an eligible private corporation requires full compliance with the statutory prerequisites. Strict construction of the terms of delegation of this power is the rule, since attributes of sovereignty overriding private property rights may not be casually exercised.

30 V.S.A. §111(1) permits the right of eminent domain to be invoked in connection with a power dam only by the holder of a certificate of public good for the project, or by the holder of a license from the Federal Power Commission. This utility admits that it has no federal license. The exercise of eminent domain must then be justified under a certificate of public good. However, the record demonstrates that the utility has no such certificate.

The public service commission's attempt to supply this lack by resort to a sort of "grandfather clause" technique has no support in the statute. Construction of the dam

prior to the enactment of the statute requiring a certificate of public good authorized and sustains its presence in the Clyde River under state law. However, this does not overcome the statutory demand that resort to eminent domain powers after the enactment of 30 V.S.A. 111(1) requires either a state certificate or a federal license.

The statute contains no exceptions. The inference is that the legislature wished the "public good" examined before eminent domain is exercised in connection with dams. Neither the public service commission nor the parties have any authority to dispense with the specified prerequisites, however small the proposed exercise of sovereignty. No more can the parties contract away the specific statutory requirements.

The parties have chosen to have recourse to the eminent domain procedure. They are bound to abide by its terms. In this case they have not qualified as authorized users of the power to condemn in either of the modes provided by the statute. The jurisdictional basis for the action of the public service commission is therefore lacking.

Although the case of In re Bellows Falls Hydro Elec. Corp., 114 Vt. 443, is indicative of the consequences of the entrance of the Federal Power Commission into the area through a navigability determination, the question of conflicting jurisdiction is not reached in this view of the matter.

For these reasons I concur with the conclusion of the majority that the jurisdictional basis for the action of the public service commission fails.

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SUPREME COURT
WASHINGTON COUNTY
September Term, 1961
No. 1910

CITIZENS' UTILITIES CO.
(Newport Electric Div.)

*v.*

CHARLES T. PROUTY ET ALS.

HULBURD, C.J., (Dissenting) Eminent domain, in any real sense, is not involved here. The plaintiff already has a contract right to the land in question. These proceedings are essentially *pro forma* pursuant to the agreement of the parties. Our statute (30 V.S.A. §110) is broad enough to permit condemnation proceedings where a contractual right exists. The corresponding federal statute (16 U.S.C. §814) is not.

This is not a proceeding to acquire land for a dam or other construction. The construction has already been done at a time prior to the enactment of any requirement for a certificate of public good. Accordingly, the public service commission has found that the plaintiff possesses all the authorization needed under 30 V.S.A. §111(a). The opinion of the majority does not rest on any error growing out of this finding. As the case stands, it is as if we have a plaintiff, possessing a certificate of public good, which petitions the public service commission for condemnation in connection with a contract as to land on a stream which has not previously been determined to be navigable. The question is whether the Federal Power

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Commission by coming on the scene later with its declaration that the Clyde River is navigable necessarily ousts the public service commission of its jurisdiction. I believe that the state commission having properly entered upon hearing the petition, retained jurisdiction to complete what it had started to do. My reason for so holding would be that there is nothing in the nature of what was sought to be done which could possibly be in opposition to any federal interest. The matter was concerned not with the initiation of a project but with the culmination of a contract under which land is inevitably to be acquired, federal license or no federal license. I am unwilling to assume that proceedings before a state public service commission, with their attendant expense, must automatically come to a dead-end in the circumstances presented by this case. Any "dual system involving the close integration of these powers" can not be said here to be running into "a futile duplication of two authorities over the same subject matter." First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152, 171. I am unwilling to say that state-federal relations have degenerated to a point where the jurisdictions of the two cannot coexist in a situation of the sort presented to the commission. At least I am disposed to wait until we have been told so before accepting this conclusion.

In view of the concurring opinion, I cannot leave the question with what has been said.

It is always desirable to keep before us basic concepts. One of these is the Legislature's intent which lies behind a given statutory requirement. Here we are concerned with a certificate of public good. It seems clear that what the Legislature intended was this: private property ought not to be taken from a man in the name of the sovereign,

i.e., the public, unless the public good is going to be served. To take a man's property against his will, in the name of the public, where no public good demands it, would be the worst kind of tyranny. It follows that where the land owner, by his own contract has freely bound himself to convey the land in question, all reason for establishing public good has disappeared. Here we have a dam with its appendage, that is, the penstock leading from it, which have been constructed long before the "public good statute" was enacted. The concurring opinion concedes that the existence of the dam and penstock is "secure"; in other words, it is as if they were there by virtue of a certificate of public good, but that this security does not extend to the land which underlies them, even though the utility, long before the public good statute, acquired, by contract, a right to own that land. I am unwilling to give the defendant landowners the benefit and protection of a position which has been bargained away by them. One asks: What is there to hold a public good inquiry on? The dam and penstock are there; secure; conveyance of the land has been promised by contract. To say that the public service commission sought to proceed on "a sort of 'grandfather clause' technique" is not sufficiently comprehensive. Having taken judicial notice of its records showing a long course of recognition of the utility and its operations—something which is not at hand for this Court—the public service commission's position may be supported on the broad ground that in view of the contract which antedated the public good statute, it would be a meaningless insistence on a useless act to make a formal public good certificate a prerequisite for the proceeding involved in this case. The legislative objective has already been satisfied.

# Appendix C

## STATE OF VERMONT

ORLEANS COUNTY, ss.

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|---|---|
| CITIZENS UTILITIES COMPANY (Newport Electric Division) v. CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELEANOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY | Public Service Commission No. 2742 |

## REPORT

(of Public Service Commission dated August 26, 1960)

This case involves the determination of the value for eminent domain purposes of about 5.4 acres of land about 700 feet long on both sides of the Clyde River. The land involved is situated in the City of Newport, County of Orleans and State of Vermont between the Clyde Pond Dam and storage reservoir owned by Petitioner and Petitioner's power house, the Petitioners' land being 300 feet from the Pond, and Petitioners' power house being about 900 feet from the land in question. Permanently installed steel penstocks crossing Petitioners' land help to convey water from the dam to the power house and the only practical route to conduct water from the dam to the power house is over Petitioners' land. Moreover, about one half of the 140.14' fall from the dam to the power house is on the Petitioners' land. The generating station, thus using the fall of the Clyde River and Petitioners' premises, contain three generating units, and

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has 3600 KW of installed capacity; they produced in calendar year 1957 over 14 million KWH and in 1958 over 16 million KWH.

Historically, the Clyde Pond Dam was built in 1921 or 1922; one long penstock 5 feet in diameter leading from a now unused dam on Petitioners' premises to the power house was extended upstream to the Clyde Pond Dam in 1940; the other longer penstock, 6 feet in diameter, crosses only 225 feet of Petitioners' land. The effective head at the main station was less in 1931 than in 1956, 107' as against 140-143 and this increase has resulted in increased generating capacity to Petitioner. There is no practicable method of utilizing the fall without crossing Petitioners' land.

The premises in question were conveyed on July 29, 1930, effective October 1, 1930, by Petitioner's predecessor in title Newport Electric Light Co., to Petitioners' predecessor, one Abbie D. Prouty, and on the same day leased back from Buyer to Seller for 25 years at a rental of $625 per month plus taxes or $7,500.00 plus taxes per year, subject to an option to purchase for $150,000.00 expiring on October 1, 1935 and not exercised, and containing a binding purchase and sale agreement that within 6 months after the expiration of the lease, the Lessee would sell and the Lessor would buy at a mutually satisfactory price or, if the price could not be agreed upon, at a price to be determined by condemnation proceedings brought within such six months period "before the tribunal then having jurisdiction" or if such proceedings were not brought at a price of $300,000. Petitioner instituted a condemnation petition before this Commission within the required period. Petitioners contest the jurisdiction of this Commission, claiming that the Clyde River is navigable and hence subject to the jurisdiction of the Federal Power Commission.

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On May 11, 1956, Petitioners instituted an action in the U.S. District Court in Vermont seeking an injunction to prohibit further proceedings in this eminent domain proceeding and further sought a decree for specific performance of the lease purchase agreement, requesting a judgment for $300,000.00. The District Court, in 150 Fed. Supp. 892, refused the request for the injunction but did find the Clyde River navigable and granted judgment for $300,000.00. This decision was appealed to the 2nd Circuit Court of Appeals. The appellate Court held that the granting of this judgment would be a violation of the spirit of federal state cooperation, since it would have the same effect on the granting of an injunction against state jurisdiction. As a result, it reversed the District Court and indicated the question of jurisdiction was properly an issue for this Commission to determine. See *Peconta et al vs Citizens Utilities Company*, 257 Fed. (2nd) 692.

The Petitioners filed on a plea to the jurisdiction of this Commission to determine this matter. The Commission held and does hold now that it has the jurisdiction to make an award whether or not the Clyde River is navigable. Actually, in *Citizens Utilities vs FPC*, 279 Feds. (2nd), an appeal from a decision of the FPC which held the whole Clyde River to be navigable, the Circuit Court of Appeals held that the Citizens' dams were capable of affecting the flow of water in the river below so-called Unit #11 but left open how much of the river above Unit #11 which would include the premises in question was navigable. Therefore, Citizens Utility Company was ordered to seek a license for Unit #11 on this limited ground.

Thus, the case now stands no different than it did when this petition was filed. The portion of the Clyde River herein involved has not been declared to be navigable. It

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the Statute (Federal Power Act) as a complete statute of eminent domain, which would serve to exclude the rights of the Condemnor under a state law, we are convinced that this Statute would have been far more complete and would have included many provisions which are omitted." See also *Sage v. Public Service Commission* (1968) 182 N.Y.S. 2d 223, to the same effect. To hold that a utility must wait to have the Federal Power Commission declare a river navigable and must secure a license before it can proceed to seek eminent domain under state law or in state courts which it could then do is clearly untenable. As was said in the Oakland case, "The Federal Power Act came to fulfill, not destroy." It is a remedial statute enacted by the Federal Congress to extend the rights of eminent domain in favor of licensees under the Act." The New York Court added "* * * the State does not surrender such power of eminent domain by acceptance of a license".

Since we hold that this Commission does have jurisdiction to hear the matter, the next question is whether the Petitioner has complied with requirements set forth under Vermont statutes. The Petitioner is clearly a public utility under the jurisdiction of the Commission and we so find.

"Under 30 V.S.A. Sec. 100, the right of eminent domain is granted to companies under the jurisdiction of the Commission when necessary [to] render adequate service to the public in the conduct of its business". Sec. 110 sets forth the procedure in instituting the eminent domain procedure which was followed in this case. Sec. 111 requires certain findings by the Commission. Sub paragraph (1) provides "In the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission, has been granted".

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The Petitioners have raised the issue that their petition [illegible] condemnation of land for a dam and that as a [illegible] under 10 U.S.A. Sec. 111 etc. the Petitioner must [illegible] either a certificate of public good or a Federal [illegible]. The Petitioners state that no condemnation land [illegible] a dam but like for flowing land for a pole line. It [illegible] claims in any event, it has such a certificate, [illegible] determining whether it [illegible] have a certificate of [illegible] good, clearly it has no federal license it is necessary [illegible], to determine whether condemnation of land lying [illegible] a power plant and a dam all owned by the Petitioners is to be construed as land involving a dam. See. [illegible] can refers to a certificate authorizing the project. [illegible] certificate thereon referred to is the certificate [illegible] under 10 U.S.A. Sections 701 and 702. Sec. 701 [illegible] particularly relevant since the jurisdiction of the [illegible] Service Commission to investigate "dams and projects [illegible] to or are incident to the generation of electric [illegible] for public use". Certainly these projects and [illegible] sought here to be condemned are projects related to [illegible] incident to the generation of electric energy for public [illegible]. If any further authority is needed, the Wisconsin [illegible] under a statute authorizing the Public Service Commission to grant permits to construct, operate and maintain [illegible] to persons corporations or municipalities, held [illegible] the term "dams" is not limited to the structure [illegible] across the river bed but includes a canal which [illegible] water through a generating plant and back for the [illegible] *Kaukauna Public Service Commission*, 90 NW [illegible] 100, 101, 97 Wis. 507. In that case, the Public [illegible] Commission was authorized to grant a permit for [illegible] canal under the general statutory authority [illegible] permits "to construct, operate, and maintain [illegible]". Accordingly, we do hereby hold that under Sec. [illegible] it is necessary that the dam and plant associated

with this land to authorized to the extent required under Vermont law.

The Petitioner also claims that the Petitioner does not possess a certificate of public good authorizing the project. In determining whether there is a certificate, 10 V.S.A. Sec. 702 which provides that a permit is required was not passed until 1929. Thus, most of the original project here involved was constructed before there was any such statutory requirement. It was not until 1945, that a company in case of dams was required to show a certificate before proceeding in eminent domain cases under Sec. 111 (a), see 1945, No. 138 Sec. 6. In Docket #2080, dated September 27, 1954, the Petitioner did secure authorization under said section to make certain modifications on the dam and said modifications were permitted. Accordingly, so far as the record stands, no authorization was needed for the original dam since it was in existence before the time a permit was required. There have been no alterations appearing in the record which would require additional authorization other than those already granted. Therefore, we find that the Petitioner does possess all authorization required under Sec. 111.

30 V.S.A. Sec. 111 (b) also requires a finding of necessity in order to render adequate service. In this case, because of the topography, there is no question but what the Petitioner's land is necessary as a location for the penstocks for the Petitioner. The Petitioner attempted to negotiate in good faith for the purchase of said tract but the negotiations were unsuccessful. There is no possible alternative route, and the penstocks are absolutely necessary for the efficient operation of the power plants in

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order to maintain adequate reliable service to the public in the conduct of their business, and we so find.

The next question to be determined is the time of valuation. It is often said that the value is to be determined at the time of taking if there is no statutory law covering the proper time. In Vermont, the legislature has never seen fit to resolve the issue nor has there been a judicial ruling on this matter. In other states, there has been a variety of decisions and laws, see 3 Nichols, Eminent Domain, Sec. 85, page 17.

In this case, the lease expired on October 1, 1955 and according to the terms thereof, if the property were to be condemned, a petition was to be brought within 6 months. On March 27, 1956, the Petitioner filed its petition for condemnation of these lands. As is previously noted, an ancillary legal proceeding was then instituted by the Petitioners. Finally, on December 2, 1959, a hearingswas held to determine the value thereof. During the interval from October 1, 1955 to date, the petitioner has been paying a sum by way of rent to the Petitioners.

In trying to determine which is the best rule to adopt, consideration should be given to the intention of the parties if there is any. It would seem that, in this case, the parties were anxious to have condemnation instituted shortly after the expiration of the lease so as to avoid uncertainty to each. Several States have adopted the time of filing of the petition as being the proper time of valuation, such filing being the first actual step towards devoting the property to public use. This seems the just procedure for it does not encourage speculation by one of the parties to delay on the expediting of the case in hopes the value will change. Though the delay occasioned

as a result of other proceedings were not done with this in mind, it is an excellent example why the time of valuation should be made as of the date of the filing of the petition. Actually, there has not been any significant change in valuation between April 1, 1956 and December, 1959, but there may well have been. Accordingly, as a matter of law, the Commission rules that the time of valuation shall be March 27, 1956 and considers as appropriate and relevant any testimony of value submitted as of the close of 1955, a convenient time and close enough to be pertinent.

The evidence on value has been widely disparate. Petitioner's experts opining that the value is $2,000,000, excluding in their computations any value to the premises for the purposes of Petitioner, or any other utility, except as a development of a completely new hydro-electric generating facility on Petitioners' property taken alone and by itself. Petitioners' chief witness did not testify as to the value of the power to Petitioner but stated his opinion of fair market value of the land taken at $215,000.00, based on the general value of water power in Northeastern Vermont, the lease, sale value to another utility and the absence of lower riparian owners.

Our statutes, 30 V.S.A. § 109 et seq., provide for condemnation of "rights to appropriate, direct and flow back water," 30 V.S.A. § 115, and state that the Commission "shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment." 30 V.S.A. § 111 (3), thus leaving open the tests to be used in determining just compensation or in the words of the Vermont Constitution (Art. 2nd, C.1)

"an equivalent in money" of the property taken. While 30 V.S.A. § 124 does provide that "Upon the payment or deposit of the amounts awarded by the commission, with interest, in accordance with its order, the petitioner shall be the owner of the property or right described in the findings," there is no statutory indication as to the time at which the property is to be deemed taken for purposes of determining compensation. The Vermont cases leave these questions open, though *Hooker* v. *Montpelier & W.R.R.R.*, 62 Vt. 47, 49 informs us that the best available use of the property taken must be considered and "mere prospective speculative values" must be disregarded. We, therefore, feel free to turn to general law for purposes of determining the measure of compensation and the date at which such compensation is to be ascertained.

It seems apparent that here there may be lacking anything other than a nominal "fair market value" to the premises if we define that troublesome phrase in one of its better senses as "the price which the property would have brought in a market which the owner himself, but not the taker, is a potential bidder," and consider the land taken as a separate parcel. See 1 Orgel on Valuation under Eminent Domain (1953) § 15, p. 78. The only sale of property in the vicinity at all comparable as to which evidence was introduced related to a piece of property selling in 1955 for $10,000, but, while that piece was sold for power development purposes, it is downstream from the power house and plainly not comparable to the land in question here; the element of fall and the element of necessity for utilizing the upstream dam were not involved in the sale of the other parcel. That sale does demonstrate, however, the fallacy in the Petitioner's experts'

appraisal of the value of the Prouty land as such at $2,000,000. Of course, it has been suggested that in this type of case in the open market the owner might have sold the property to a land speculator buying in expectation of resale or the taking by Petitioner and that this would enhance the "market value" of the premises, 1 Orgel, op.sit. supra, § 83, but this is here too remote a possibility to be taken into account, or at least its effect would be too difficult to measure to warrant its consideration. From the Petitioners' standpoint it may be fortunate that we are not necessarily limited to making a finding as to "fair market value." As has been stated in *Beale* v. *Boston*, 166 Mass. 53, 55, 43 N.E. 1029 (1896), " " " market value is not a universal test, and cases often arise where some other method of ascertaining value must be resorted to." Or, as a leading valuation theorist puts it, "Market value is simply the ordinary test, to be rejected in those exceptional cases where it would not constitute just compensation." 1 Orgel § 18, p. 86.

Nor do we receive much satisfaction from the theory pressed upon us by Petitioners, that the rental value of $7,500 fixed in the original 1930 lease is "entitled to great weight at the present time." We do not quarrel with the general proposition that taking account of realized and prospective rentals is justified where direct evidence of sale value is inadequate, and in any event evidence of rental value is probably admissible, though by no means conclusive. *Sinsabaugh* v. *United States*, 168 F. 2d 264 (C.A. 4, 1948); *Grand River Dam Authority* v. *Martin*, 192 Okl. 614, 138 P. 2d 82 (1942). Indeed we do not disagree with the famous Goat Island and Prospect Park case, relied on by Petitioners here, basing awards for the taking of

those unique properties on such evidence. *Matter of State Reservation at Niagara*, 16 Abb. N.C. (N.Y.) 159 (1884), aff'd, 16 Abb. N.C. (N.Y.) 395 (1885). But here the income received from the property, the rental itself, was derived out of a transaction which we cannot justifiably hold was at full arms' length in the ordinary commercial sense: Newport Electric Co., owning the property, sold it and on the same day leased it back from Abbie Prouty, agreeing not only to pay rent but also to purchase it back at the end of the lease at a price to be fixed by one of three designated methods. To be sure, we do not know the consideration paid for the property by Mrs. Prouty, nor the considerations prompting the parties to enter into such an arrangement. But the arrangement was a peculiar one, which might properly be considered as amounting to a "forced-purchase." See *Ligare v. Chicago, M. & N. R. R. Co.*, 116 Ill. 249, 263, 46 N. E. 803 (1897): "The limitation to such price as the property would bring under ordinary circumstances surrounding the sales of property was necessary to exclude a price based upon necessity of railroad company, or upon what it would pay rather than get off the property." Uniformly, the courts have held that the necessities of neither owner nor taker must be permitted to affect the value to be received or paid. *Chelan Elec. Co. v. Parra*, 148 Wash. 353, 358, 268 Pac. 1040 (1928); *U. S. v. Fisher*, 49 Kan. 17, 30 Pac. 111 (1892) ("not a value obtained from the necessities of another"); *cf. Nanthala Power & Light Co. v. Sloan*, 41 S.E. 2d 361 (1947).

This case presents the difficult problem engendered by the reason of the fact that on the one hand the higher or best use of the land is plainly as a part of a hydroelectric

power site; it is unique; it has a special adaptability as such, has been used as such successfully and can and still is being used for this special purpose. On the other hand, however, taken in and of itself, and considered as a separate entity apart from the dam site upstream and power generating station below, its value as such a site for hydroelectric power development on it alone, which Petitioner's witness Hooper testified was of no value, is obviously limited. Indeed, such a development would probably be impractical and as such this testimony is basically unrealistic.

To resolve this dilemma we are still faced with two major problems of law and our ultimate valuation must be determined in the light of them. Should we give weight to the special or higher adaptability or use of the land in question as a part of a hydroelectric power development where as here it is dependent upon combination with other parcels of land and should we do so where the value of the combined parcels is dependent on the securing or retention of federal and state franchises or licenses? Should value to the taker—obviously not a conclusive test (1 Orgel § 83, p. 355)—be given any weight at all? To help solve these problems we can turn to the decided cases, though one notable commentator has cautioned that they may be on these questions "both confusing and irreconcilable" and indeed may "form a hopeless web of confusion and obfuscation." Bonbright, The Valuation of Property (1937 ed.) pp. 423, 425.

We can start with what has been called the leading case, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206 (1878) where the Supreme Court held that the value of land, consisting of three islands in the

Mississippi River, must be determined "not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted"; that the position of the three islands fitted them to form "in connection with the west bank of the river, a boom of immense dimensions" and that "Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." 25 L. ed. at 208. The Court pointed out that the owner whose land was being taken might have been given a license by the state to construct a boom and that the charter of the taker enabling it to receive and take control of all logs and timber to be conveyed to any point on the Mississippi was not exclusive. Thus, the case clearly holds, though it contains no penetrating analysis of its holding, that the land should be valued in combination with other lands not owned, apparently, by the owner, viz., the west bank of the river; and that where the taker's charter is not exclusive (there is nothing to indicate that the Citizens' franchise and license to operate a power site is necessarily exclusive), the value of the property in the light of its special adaptability must be taken into account.

*United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 51, 57 L. ed. 1063 (1913), on the other hand, reversed a lower court ruling that Oshowano Island in the St. Mary's river had "a strategic value with reference to any general scheme of water development in the river, and because it must be included as a tail race site, if not otherwise, in any completely efficient plan of development by any owner, private or public." Here the court held that "It is not proper to attribute to it any part of

the value which might result from a consideration of its value as a necessary part of comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. * * * The 'strategic value' for which $15,000 has been allowed is altogether speculative * * *. But in a condemnation proceeding, the value of the property to the government for its particular use is not a criterion." 57 L. ed. at 1082. Thus, the case denied value in conbination with other lands because such other lands were under other ownership, and held broadly in effect that value to the taker is not to be considered.

*McGovern* v. *New York*, 229 U. S. 363, 57 L. ed. 1228 (1913), narrows the *Chandler-Dunbar* holding somewhat, though sustaining as not in violation of the due process clause a New York determination of value without taking into account the value of land for a reservoir site where the enhanced value was dependent on "hundreds of titles to different parcels." Said the Court: "If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect on valuation. * * * The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. * * * In estimating that probability, the power of effecting the change by eminent domain must be left out." 57 L. ed. at 1232. Thus, where so many titles are involved that as a practical matter

combination can be effected only through eminent domain, a finding of no strategic value does not violate due process, though the Court was careful to say that there is "wide discretion allowed to the trial court" and further careful to say that the holding was only that the due process clause was not violated. Here, of course, ownership is presently in only two hands, and there is nothing to indicate that ownership would necessarily have to be acquired by eminent domain.

*Olson* v. *United States*, 292 U. S. 246, 78 L. ed. 1236 (1934), involving Lake of the Woods shore lands taken for flowage easements that, inter alia, were available for the generation of power, held that no special value was allowable because "There could be no rational basis for any demand that would affect value to the owner for reservoir purposes unless, as a legal and practical possibility, he or some other person or persons—other than the expropriating authority—could have acquired the right to flow the lands necessary for the lawful raising of the lake." 78 L. ed. 1247. Because the lands involved were in two countries, neither of which could authorize expropriation in the other, and taking into account "the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with," there was "no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question." In so holding, the court pointed out that:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably

sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage*, 239 U. S. 57, 61, 60 L. ed. 143, 146, 36 S. Ct. 25. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, ubi supra."

*United States ex rel T.V.A.* v. *Powelson*, 319 U. S. 266, 87 L. ed. 1390 (1943) (5-4), allows no recovery for "water power value" when the combination required consisted of "several hundred other tracts owned by strangers" and "It was practically conceded that the acquisition of all the property necessary for the four-dam development could not, in all reasonable probability, be accomplished without resort to the power of eminent dómain." 87 L. ed. 1397. Again, however, the Court pointed out that "the value may be determined in light of the special or higher use when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract." The test of special value is whether there is "a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future." 87 L. ed. 1398. In the case at bar, that probability has been a reality for many years past.

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In *Grand River Dam Authority* v. *Grand Hydro*, 335 U. S. 359, 93 L. ed. 65 (1948) (5-4), the Court held that expert testimony which gave recognition to the land's availability "as a power site" was admissible despite the fact that the owner did not have a federal license which would have been necessary under the Federal Power Act if it were to utilize the land as a power site. In *Grand River*, there was no question as to combination, but the case stands clearly for the proposition that the absence of an appropriate license under the Federal Power Act does not impair otherwise existent special values.

Compressing the Supreme Court cases in a nutshell we arrive at the conclusions that availability for special use in combination with other lands not owned by the person or body whose land is taken may be considered if there are not so many others involved that it would be purely speculative in the absence of an exercise of eminent domain powers to suppose that the lands could be united, and that the fact that the owner himself lacks necessary eminent domain or franchise powers is immaterial. Here the element of speculation is not present: The Prouty lands have been used as a part of a hydro-electric development for 30 years in combination with lands owned solely by Citizens Utilities Co. Leaving aside competitors in the private power business who might wish to acquire such a site were Citizens not now in operation, there is always the possibility that municipalities, the United States or even the State of Vermont might wish to do so for their own purposes at a price satisfactory to both Citizens and the Proutys, with or without the exercise of eminent domain powers. Accordingly, we hold that the special adaptability of the Prouty lands as a part of a power site

must be considered in determining what is just compensation or, indeed, fair market value. In so holding, we note the conflict in and support from, other state and lower federal court cases. See generally, 31 Col. L. Rev. 1 (1931); 29 Harv. L. Rev. 427, 428; *Smith* v. *Commonwealth*, 210 Mass. 259; 96 N.E. 666, 667; *Ford Hydro Elec. Co.* v. *Neely*, 13 F. 2d 361, 362 (C.A. 7, 1926).

*U. S.* v. *243.22 Acres of Land*, 48 F. Supp. 177, 180 (E. D. N. Y. 1942).

It is in applying the conclusion of law we have reached to the instant facts that difficulty occurs. In so doing, however, we were aided by a view of the premises, and we understand that it is our duty to arrive at a determination of value in the light of all the evidence. *Latchis* v. *State Highway Board*, 120 Vt. 120, 133. We understand that we are not bound by opinions of experts or by what might be thought to be the apparent weight of the evidence, but may reach our own conclusions, aided by the view and all of the evidence. *Shoemaker* v. *United States*, 147 U. S. 282, 37 L. ed. 170, 187 (1893).

In summarizing the evidence as to valuation, the petitioners presented two expert witnesses. The first expert witness for the petitioner was Alcott L. Hooper, Chief Hydraulic Engineer for Stone & Webster Engineering Corporation. Mr. Hooper, in arriving at a valuation to be placed upon the land and rights of the party interests disregarded any value this site might have to the Citizens Utilities Company. He approached the valuation problem by trying to determine whether or not this site, in and of itself, might have a value to a person interested in developing this site as a hydro project. The results of his study

indicated, and it was his opinion, that the site here involved had no value as such.

The next expert witness in behalf of the petitioner was George Clendaniel of Woodstock, Vermont, a real estate appraiser and a member of the American Institute of Real Estate Appraisers. Mr. Clendaniel disregarded any value that the property and the rights thereon might have to Citizens Utilities Company. He did testify that it might have value, but he did not know how much. In general, Mr. Clendaniel compared this property to similar properties located throughout Vermont which he had studied or as to which he was familiar with the terms of the past sales. He paid particular attention to the so-called Dale property, a larger parcel located below the site herein involved. The Citizens Utilities Co. paid $8,800 for this property, which it used in constructing a dam and diversion canal for the so-called Unit #11. He did testify (see page 336), however, that he thought that the property was sold primarily for land and could not testify for certainty whether or not the value herein involved indicated any value to the Citizens Utilities Co. as a part of a power development program. Mr. Clendaniel also testified that he paid very little attention to the terms of a lease under which this property was being rented by the Citizens Utilities Co. over the last twenty odd years. He testified that the terms of this lease in his opinion were not normal and therefore, he disregarded this in determining the value of the property herein involved. In conclusion, Mr. Clendaniel testified that the value of the property in his opinion was $2,000. (See page 253).

On behalf of the petitioners, Howard M. Turner, former instructor in hydraulics at Harvard University and pres-

cently a retired professor of civil engineering and a registered professional engineer, practicing under his own name, testified that in his opinion a fair market value for the premises in question would be $215,000 (see page 389). This value was determined by the witness after considering a number of factors. Among the factors considered was the general value of power in northeastern Vermont; the existence of suppliers of wholesale power, such as the New England Power Company; the steam plant in Burlington; the rate for surplus power sold by the Central Vermont Public Service Corporation; the fact that the property owned by the Prouty's had been rented for a number of years at $7500 a year and that there had been a valuation of $150,000 placed on the property in the early portion of the lease here in question; and lastly to some extent, the value of surrounding hydro-electric plants. Over and above these factors, the witness primarily placed his opinion as to the value of these rights upon the results obtained from a formula derived in the following manner. He determined that the plant now operated by the Citizens Utilities Company would produce 3,000 kilowatts of prime peak capacity and 12,900,000 kilowatt hours of energy. He then proceeded to determine what the cost of an alternative source of power would be for a capacity of this amount and a comparable amount of energy. He thereupon allocated a value of $25 per kilowatt for the 3,000 prime capacity arriving at a figure of $75,000. To establish a value of an alternative source of energy, he used a figure of 7½ mills which was an average of 9.2 mills for diesel energy and 5.7 mills for purchased energy. 12,900,000 kilowatt hours at 7½ mills equals $96,800.00, which makes a total of $171,800.00 as the value of the

output of this plant. Operating expenses, together with depreciation and estimated taxes amount were estimated as $108,500 leaving a net yearly income from this plant of $65,000. This amount was then capitalized at a rate of 6 1/2% arriving at a total value of the plant and rights of $973,000. The witness thereupon deducted the value of the plant, which was derived on a basis of original cost less accrued depreciation of $437,000.00, arriving at a figure of $533,000.00 odd dollars for the total overall value for the rights. To arrive at the value of the Prouty rights, the witness then divided this figure by one-half, arriving at an approximate figure of $267,000 as the basis for the Prouty water rights. In dividing the total overall value of the rights by one-half, the witness based his decision to do so on the fact that the Prouty water rights constituted generally one-half of the total head. The witness admitted that the fair market value as thus determined was the sale value to another public utility operator, be it Citizens Utilities or another, since utility companies would be the only possible purchaser.

Upon cross examination it was brought out that the value established per kilowatt of demand was a matter of judgment and could well have been a figure less than $25 a kilowatt. The witness further agreed that 7½ mills was in his best judgment a fair price for energy, though this again could be questioned. Cross examination further brought out that in allocating one-half of the value of the rights to the Prouty interests, he was not taking into consideration the bundle of rights that accrued as a result of the inclusion of the Clyde Pond, but had arbitrarily made his division on basis of head alone.

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### *Additional Findings of Fact*

The other witnesses on the behalf of the petitioners were the party themselves; namely, John A. Prouty and Elsinor Prouty Mallory, both of whom testified that in their opinion the fair market value of the property here involved was $300,000.

After giving due consideration to the evidence as set out in the record, including among other things, the evidence of Mr. Hooper, Mr. Clendaniel, Mr. Turner, the lease contract, the value set forth by Mr. Gibbs and by petitioners themselves, and further basing our opinion on our view of the premises, it is the determination of the Commission that the fair market value for the premises in question is $95,000.

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### ADDITIONAL FINDINGS OF FACT

(of the Public Service Commission dated October 17, 1960)

1. In addition to the Findings already set forth in Docket No. 2742, dated August 26, 1960, the Commission additionally finds that the property to be condemned is as follows:

The property and rights to be taken in this condemnation proceeding, valued as aforesaid, are more particularly described as being all and the same lands, premises, water power, dam, water privileges, buildings, machinery and fixtures as described in a certain indenture and

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### *Additional Findings of Fact*

agreement between Abbie D. Prouty, a widow, and Newport Electric Light Company, dated July 29, 1930, wherein such property and rights is more fully described as follows:

"Being all and the same land and premises which were conveyed by Spaulding Brothers Corporation, a corporation, to Charles A. Prouty by warranty deed dated December 31, 1906, and recorded in Book 27, Pages 595 and 596 of the Land Records of the Town of Derby, Vermont, more particularly described as the 'Spaulding Pulp Mill Property' so-called; situated on Clyde River in the City of Newport, Orleans County and State of Vermont, a little above the plant of the Newport Electric Light Company, with all water power and water privileges thereunto belonging or appertaining. Being the same land and premises conveyed to said Spaulding Brothers Company, a corporation, organized and existing under the laws of the State of Vermont by three several deeds:—

(1) By a quit-claim deed from Edward F. Spaulding to said corporation dated August 26, 1901, and recorded in Book 25, Page 80, of the Land records of said Town of Derby.

(2) By a quit-claim deed from Waldo Spaulding to said corporation, dated August 26, 1901, recorded in Book 25, Page 81, of the Land Records of said Town of Derby.

(3) And by Huntley N. Spaulding, as administrator of the estate of Jonas Spaulding, by an administrator's deed dated August 26, 1901, and recorded in Book 20, Page 300 of the said Land Records, to which deeds and said records thereof, reference is hereby made for a more particular description.

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### *Additional Findings of Fact*

Meaning to include what is known as the Pulp Mill Property, water power, dam, water privileges, and all buildings, machinery and fixtures now on said property, and being the same real estate which was conveyed to the Newport Electric Light Company by Charles A. Prouty by an instrument dated June 29, 1907, and recorded in the Derby Land Records in Book 28, Pages 367 and 368; all of said property having been willed to Abbie D. Prouty by the late Charles A. Prouty, and having been decreed to said Abbie D. Prouty by the Probate Court for the District of Orleans, State of Vermont."

The interest of the said Charles T. Prouty in and to the property and rights so taken in condemnation is described in quit-claim deed of Boston Safe Deposit and Trust Company to Charles Tyler Prouty, dated July 17, 1936, and of record in Book 10, Page 354, of the Land Records of the City of Newport, Vermont.

The interest of The Third National Bank and Trust Company in and to the property and rights so taken in condemnation is described in warranty deed of Charles Tyler Prouty to said Bank, dated December 23, 1941, of record in Book 12, Page 590, of the Land Records of the City of Newport, Vermont.

The interests of Genevieve Prouty Gage in and to the property and rights so taken in condemnation are described in quit-claim deed of Boston Safe Deposit and Trust Company to Genevieve Prouty Gage dated March 25, 1947, and of record in Book 15, Page 434, of the Land Records of the City of Newport, Vermont, and in a mortgage deed of an undivided one-fourth interest thereof as described in mortgage deed from Howard A. Mallory and Elsinor Prouty Mallory to Genevieve P. Gage, dated

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*Additional Findings of Fact*

February 27, 1953, and of record in Book 19, Page 255, of the Land Records of the City of Newport, Vermont.

The interest of John A. Prouty in and to the property and rights so taken in codemnation is described in quit-claim deed of Boston Safe Deposit and Trust Company to John A. Prouty, dated October 18, 1946, and of record in Book 15, Pages 364 and 365, of the Land Records of the City of Newport, Vermont.

The interest of Elsinor Prouty Mallory in and to the property and rights so taken in condemnation is described in a quit-claim deed of Boston Safe Deposit and Trust Company to her dated August 29, 1952, and of record in Book 19, Page 70, of the Land Records of the City of Newport, Vermont, subject to mortgage of record held by Genevieve Prouty Gage as appears in Book 19, Page 255, of said Land Records, above enumerated.

Reference may be had to said indenture, agreement, deeds and the records thereof for a more particular description of the property and rights here involved and taken in condemnation.

2. That the petitioner, Citizens' Utilities Company, exports small amounts of power to the Dominion of Canada.

3. That the reference to the *Citizens Utilities* vs. *F.P.C.* on Page 3 of the Report is hereby amended to read 279 Fed. (2nd), Page 1, rather than 276 Fed. and said case together with the Opinion and Order of the Federal Power Commission is hereby made a part of this record.

## Appendix D

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

*Plaintiffs-Appellees,*

*v.*

CITIZENS UTILITIES COMPANY,

*Defendant-Appellant.*

No. 206, Docket 24820.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Argued April 9, 1958.

Decided July 3, 1958.

Certiorari Denied Oct. 20, 1958.

See 79 S.Ct. 98.

GALLOP, CLIMENKO & GOULD, New York City, and CLIFTON G. PARKER, Morrisville, Vt., for appellant. MILTON S. GOULD, ARTHUR S. FRIEDMAN, New York City, of counsel.

HAROLD I. O'BRIEN, Rutland, Vt., and ARTHUR GRAVES, St. Johnsbury, Vt., for appellees. EDWIN W. LAWRENCE, Rutland, Vt., of counsel.

Before SWAN, HINCKS and MOORE, Circuit Judges.

SWAN, Circuit Judge.

This is an appeal by defendant from a judgment for plaintiffs in a suit for specific performance of a contract to buy land located in the City of Newport, Vermont. Federal jurisdiction was based on diversity of citizenship

between the respective parties. The defendant, a public utility corporation supplying electric power locally and in interstate and foreign commerce was in possession of the property under a 25 year lease made in 1930 between the plaintiffs' predecessor in title, as lessor, and the defendant's predecessor, as lessee. The lease provided that it should enure to the benefit of, and be binding upon, the heirs, successors and assigns of the respective parties. By the terms of the lease the defendant was obligated to buy, and the plaintiffs to sell, the leased property within six months after the termination of the lease on October 1, 1955, at a price to be agreed upon, or failing agreement, at a price to be determined by condemnation proceedings to be instituted by the defendant within said six months period "before the tribunal then having jurisdiction of such proceedings." If such proceedings were not instituted, the price to be paid for the property was $300,000. No agreement as to price having been reached, the defendant, on March 27, 1956, filed a timely petition for condemnation with the Vermont Public Service Commission pursuant to sections 9331-9333 of Vermont Statutes, Revision of 1947. The plaintiffs were named as defendants to this petition which is still pending, and no action upon it has been taken by the Vermont Commission.

On May 11, 1956, the plaintiffs brought the present suit for specific performance of their contract with the defendant. The property involved is located astride the Clyde River, which is a principal tributary of Lake Memphramagog. The only issue of fact in dispute was whether the Clyde River was a navigable stream. An advisory jury returned a verdict that the river was a navigable stream within the meaning of the Federal Power Act, Chapter 12 of Title 16 U.S.C.A. Judge Gibson approved the jury's verdict. He found also, as admitted by the pleadings in

the federal suit, that the defendant had not applied for or obtained from the Federal Power Commission a license for constructing, operating and maintaining its facilities along, over, or in the Clyde River, and had not filed with the Federal Power Commission a declaration of its intention to construct such facilities, pursuant to § 23 of the Federal Power Act, 16 U.S.C.A. § 817. Because of these findings the trial judge held that the Vermont Public Service Commission was without jurisdiction to hear and determine the petition for condemnation pending before it, and consequently the defendant had defaulted under its contract and was obligated to purchase the property at the price of $300,000. The decree appealed from so directed.[1] Judge Gibson's opinion is reported in 150 F. Supp. 892.

[1, 2] The opinion of the district court and the briefs of the parties in this court have taken a much wider range than we think necessary for disposition of the appeal. In our view the decision can rest on a principle of narrow compass. Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.[2] The petition for condemnation was a suit *in rem*, where the state tribunal must control the property to give effect to its jurisdiction.[3] Obviously, the federal

1. The complaint also prayed for an injunction to restrain the defendant from prosecuting its condemnation proceeding. Since the decree for specific performance was dispositive of the case, the requested injunction was denied.

2. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477, 56 S.Ct. 343, 80 L.Ed. 331; Princess Lida, etc. v. Thompson, 305 U.S. 456, 466, 59 S.Ct. 275, 83 L.Ed. 285; Mandeville v. Canterbury, 318 U.S. 47, 48, 63 S.Ct. 472, 87 L.Ed. 605.

3. United States v. 625.91 Acres of Land, etc., D.C.Mo., 49 F.Supp. 997, 1000.

court could not decree specific performance of defendant's contract to buy the land without violating the above mentioned principle of cooperation between state and federal tribunals. Although the district court did not grant the requested injunction against prosecution of the condemnation petition, its decree was as effective an interference with that proceeding as an injunction would have been. The granting of such an injunction is prohibited by 28 U.S.C.A. § 2283. See National Quarries Co. v. Detroit T. & I. R. Co., 6 Cir., 10 F.2d 139, 140. There a bill in the federal court to enjoin the defendant's prosecution of a state suit to condemn land was dismissed.

Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. That was an issue for that tribunal to decide for itself subject to review as above stated.

[3] Accordingly the decision on appeal is reversed; but we do not direct that the federal suit be dismissed because, if the question of jurisdiction should ultimately be decided in the appellees' favor, the tendency of the federal suit will prevent the running of any statute of limitations.

## Appendix E

*Order Denying Application for Rehearing*

[1787]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, and William R. Connole.

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|---|---|
| In the Matter of<br>Citizens Utilities Company | Docket Nos. E-6716 and E-6760 |

ORDER DENYING APPLICATION FOR REHEARING

(Issued April 3, 1959)

On March 18, 1959, Citizens Utilities Company applied for rehearing of the Commission's Opinion No. 318 and order issued February 16, 1959, requiring Citizens to apply for a license under the Federal Power Act for the continued operation and maintenance of its Unit No. 11, Newport and Charleston hydroelectric developments on the Clyde River in Vermont and the Seymour Lake and Echo Pond dams on a tributary thereof.

With respect to the numerous objections made to our findings we find none which necessitates amending or modifying our findings. Citizens has also requested that the time within which it is directed to file application for license in accordance with our order issued February 16, 1959, be deferred until such time as all proceedings to review said

*Appendix E*

*Order Denying Application for Rehearing*

orders have been completed. We think it appropriate to grant this request pending review. However, an important basis for our previous action in requiring application for a license was the damage done and threatened to the fishery resources of the Clyde River by the operation of Citizens' facilities. In order to protect the fishery resources during any review proceedings, or in any case until the conditions of a license attach, we shall require that Citizens shall effect a minimum release of water during the spawning periods.

*The Commission further finds:*

(1) The assignments of error and grounds for rehearing set forth in the application for rehearing filed by Citizens set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its Opinion No. 318 and accompanying order issued February 16, 1959, or which having now been considered warrant any change or modification in said opinion and order except as provided below.

(2) It is appropriate in the administration of the Federal Power Act that time for compliance with our order issued February 16, 1959, be extended and that Citizens be required to effect a minimum release of water as provided below.

[1788]

*The Commission orders:*

(A) The application for rehearing filed by Citizens is hereby denied except as provided below.

(B) The requirement that Citizens shall file an application for license as provided in paragraph (A) of our previous

*Appendix E*

*Additional Findings of Fact*

order is hereby postponed until 60 days after the time for review has expired, or, if Citizens files a petition for review, until 60 days after the issuance of a final mandate by the reviewing court.

(C). Until further order of the Commission Citizens shall release a minimum flow of 35 cubic feet of water per second through the sluice gate of its Unit No. 11 diversion dam in the Clyde River from the date of issuance of this order through June 30, 1959, and thereafter each year from April 1 through June 30 and during such additional period or periods as fish are spawning or migrating in the river below the Unit No. 11 diversion dam.

By the Commission.

JOSEPH H. GUTRIDE
Joseph H. Gutride,
Secretary.

## Appendix F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259—October Term, 1959.

(Argued April 8, 1960 Decided May 24, 1960.)

Docket No. 25705

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CITIZENS UTILITIES COMPANY,

*Petitioner,*

*v.*

FEDERAL POWER COMMISSION,

*Respondent.*

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Before—LUMBARD, Chief Judge,

HAND and HINCKS, Circuit Judges.

On petition to review an order of the Federal Power Commission, determining that the Clyde River in Vermont is "navigable water of the United States" within the meaning of the Federal Power Act, and that, even though the entire river may not be navigable, the operation of the petitioner's hydroelectric dams across the river "affects interests of interstate or foreign commerce."

MILTON S. GOULD, GALLOP, CLIMENKO & GOULD, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., for petitioner.

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., for respondent (WILLIARD W. GATCHELL, Gen. Counsel, HOWARD E. WAHRENBROCK, Solicitor, LEONARD D. EESLEY, Assistant General Counsel, DANIEL GOLDSTEIN and JOSEPH B. HOBBS, Attys., Federal Power Commission, Washington, D. C., on the brief).

HAND, Circuit Judge:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a

power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1937, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "declaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a decision declaring that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under § 817 of Title 16, United States Code, to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the New-

port project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shutdown of Unit No. 11 made a sixteen foot boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817: that is to say, that "interest of interstate or foreign commerce would" (not) "be affected by the con-

struction of a dam" of the kind here at issue. The only question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of interstate use after reasonable improvements which might be made." *United States* v. *Appalachian Power Company*, 311 U. S. 377, 409. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive" (§ 825 l(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the flow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in *Georgia Power Company* v. *Federal Power Commission*, 152 Fed. (2) 908, 913 (C. A. 5).

Concluding as we do that all the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.